Federal Court Cour fédérale

BENCH & BAR LIAISON COMMITTEE (CITIZENSHIP, IMMIGRATION & REFUGEE LAW)
Meeting of October 16, 2019
Minutes

Attendance in person (Toronto) and by teleconference: Chief Justice Crampton, Justice Diner (Chair), Justice McDonald, Justice Brown, Justice Strickland, Justice Roussel, Justice St-Louis, Justice Zinn; Deborah Drukarsh / Daniel Latulippe / Diane Dagenais / Gordon Lee (DOJ); Erin Roth / Wennie Lee / Michael Battista (CBA); Jack Martin / Raoul Boulakia (RLA); Anthony Navaneelan / Andrew Brouwer (CARL); Alyssa Manning / Cheryl Robinson (RLO); David Matas, Mario Bellissimo, Gretchen Timmens, Arvin Afzali, Chloe Magee, Colleen Thrasher, Matthew Chan, Amanda Bergman, Zaira Petruf, Patrick O'Neil, Johanne Parent, Orelie Di Mavindi , Michael Switzer, Jaro Mazzola, Klara Trudeau, Andrew Baumberg.

1. Agenda / minutes [May 31]
Michael Battista / Wennie Lee moved and seconded adoption of the minutes.

2. Toronto pilot project – settlement / Annex A
Justice Diner: the pilot was launched Oct 19, 2018, and then revised July 4, 2019, to address concerns raised by DOJ regarding the obligation to discuss settlement with the client in every case. The pilot has worked incrementally to increase the number of settlements, and more significantly to reduce the rate of late settlements (last 2 weeks before hearing). It has also increased the hearing backfill rate. The objectives of achieving more timely notice of settlements and discontinuances, where backfilling can be achieved in advance of the coming wave of immigration files, has been realized.
Michael Battista: what is preventing more backfilling?
Justice Diner: if the leave Order goes out 90 days before the hearing, and the settlement notice is filed quickly, then the backfill rate could be increased. We are working on increasing the rate to the degree possible.
Klara Trudeau: if settlements / discontinuances are filed within 65 days or less of the hearing, it is not feasible to backfill. At present, this is the shortest time-frame for scheduling a hearing.
Raoul Boulakia: to allow for more backfilling, perhaps an alternative to a single leave Order could be considered. For instance, perhaps the Order setting out the steps could be separated from the Order granting leave and scheduling the hearing, and put in the Production Order for the CTR. This is what is done at the IRB – scheduling is done only after the file is prepared. Under this approach, one could include in the Production Order all the subsequent procedural steps, meaning that the scheduling could be done much sooner.
Klara Trudeau: in the past, we have tried double-booking, but it requires a very high volume of cases.
Michael Battista: if there are no production Orders for which leave is *not* granted, this could work.

> **Action:** Andrew Baumberg / Klara Trudeau to review the Bar's proposal [to develop an Order regarding production as well as other procedural steps that is separate from the Order setting the hearing date] and develop some draft Orders for discussion purposes.

Diane Dagenais would like to see a proposal in writing for consideration. As for the pilot, DOJ remains concerned with the rather limited benefits to date compared to the significant additional workload for counsel and DOJ's clients. Also, this still appears to be a relatively short window on which to assess the pilot.
Justice Diner: can DOJ provide additional feedback, and when? From the Court's perspective, this is a success.

Diane Dagenais: we need to review this with DOJ's clients and counsel to assess workload. The goal of the program was not to settle more cases, but to settle them in such a time-frame so that the Court could backfill them. Even with the July amendment, anecdotally, counsel are still doing more work, because they need to look at the files twice, i.e., at the time they assess settlement and then again when they prepare for the hearing. She would like to look at the Department's time-keeping, based on its new case management system, so as to be able to provide a more accurate assessment. Ideally, the pilot could be extended to January.
Roual Boulakia: the pilot is working the way it was intended, creating a more timely thinking about possible settlement. In terms of the burden on DOJ, with the July clarification re flexible involvement in settlement discussions, this would appear to simplify matters for the Department.
David Matas: in cases where there is a client (like a visa office), settlement consent seems to come more quickly than review of a tribunal decision. Could DOJ find some way to address this discrepancy?
Diane Dagenais: it is not clear that this observation reflects the wider reality across the wider range of files. There may be some advance client contacts in some visa cases that have allowed for expedited consent. Also, DOJ does not get client contacts at the tribunal other than on an as-needed basis.
Chief Justice: the proposal from DOJ seems reasonable. We can review the pilot early in the New Year.

3. Stay of deportation motions

Justice Diner: the revised draft Guidelines were circulated shortly before the meeting.
Justice Strickland: there has been considerable input from the Department, the Refugee Law Office, and others, on successive iterations, which addressed concerns about how to deal with urgent stay motions. This latest version represents efforts to balance the positions raised, highlighting some key aspects – motions must be brought as quickly as possible, though recognizing that sometimes there is no alternative to a last-minute motion, and that there should be a standalone motion record that is as concise as possible. Sometimes there are motions, or multiple motions, with hundreds or even thousands of pages, put on a judge's desk for hearing on an urgent basis. We have tried to narrow the issues, and are currently looking for comments to address issues that might have been overlooked.
Daniel Latulippe: comments re non-urgent situations (7-14 days); if you learn of removal 7 days ahead of removal, should one then immediately file a deferral request? Deferral requests can take 48 hrs or up to a week – bottom line in the latest draft appears to be that everyone must act expeditiously.
Justice Strickland – the Court is not telling a party exactly when to file a deferral request, but it should be done as soon as possible rather than at the last minute.
Raoul Boulakia: the CBSA will not accept a deferral request until the notice to report is issued; a party needs to file a deferral request as well as a Notice of Motion at the same time;
Daniel Latulippe: the practice in Montreal is that the Court will not accept a stay motion until the administrative deferral request is submitted and the decision by CBSA is made.
Anthony Navaneelan: are we to be permitted to file Applications based on a deemed refusal for deferral? How can we comply with the time-line otherwise?
Justice Strickland: acknowledged that there is divergence in the case-law; we cannot fix this in a Practice Guideline, but can discuss it further within the Court; we understand that there will be times when there is an issue – party must bring a prompt request for deferral.
Diane Dagenais: we need more time to review the latest draft; from a first review, there is a mention on page 2 of the time-frames for DOJ duty counsel availability – only the Toronto and Montreal offices have stand-by duty counsel; also, for these regions, counsel are on duty to 9 pm, not 9:30 pm.
Justice Strickland – we need to express the point that there will be situations when DOJ cannot respond; the Court does exceptionally get late night requests, so it needs to be addressed.
Diane Dagenais: under Form and Content, DOJ had proposed an additional phrase at the end of the first point: "unless an exception has been granted by the Court" so as to allow for less than a full motion record

Justice Strickland: when there is an urgent stay, the Court generally allows for oral submissions; also, if the proposed text were inserted, it might be interpreted as applying more broadly so as to encourage requests for exceptions in non-urgent situations.
Wennie Lee: agreed that the objective is to ensure timely filings, so that all parties have time to make submissions; however, was CBSA involved in the discussions? The timing of removal decisions comes from their policy framework. If the underlying Judicial Review application is on standalone basis, then counsel has more flexibility when filing a stay motion. But if the Application is based soley on the removal, then counsel has little control. When going to interview, her practice is to bring a draft deferral request. But the CBSA officer refuses to accept it unless there is an official notice to report for removal.Also, once this is issued, we must send a deferral request by courier. The framework would work for non-urgent motion. But the time-line requires more consideration for the urgent category, particularly given that we have no control over timing of the CBSA notice, which may land (for example) right before a long-weekend (which just happened last Friday). A recent example: the officer called the client directly to advise the client of a removal date; *is this an official removal notice, which triggers the right to file a deferral request and obligation to file a timely motion?* Again, CBSA may need to be included in our discussions.
Justice Strickland: the role of CBSA was discussed at length in previous iterations and meetings; even though we have set out the various categories and time-lines, we also indicate that Applicants should file a letter setting out the factors that are relevant to the request for an urgent hearing.
Justice Diner: the project was meant to address both the volume of material as well as multiple stay motions, perhaps due to some of the concerns raised today by Ms. Lee. The objective is not to increase the number of filings, but to make it more efficient and earlier.
Anthony Navaneelan noted the diversity of views on the Court on the deemed refusal issue, but there is no right to appeal, so no guidance to resolve the question of how to initiate the application. Until this is answered, counsel still do not know how to proceed based on the current proposal.
Justice Diner: the provisional plan was to give the bar 5 days to review and comment on this (by Monday, October 21 at 9 a.m.). The Court would then have a week to review, and the target is to finalize the Guideline for early November, but this is not fixed in stone. If matters are irreconcilable, this time-line may need to be revised.
Raoul Boulakia: the Court is in a bind, because there are varying practices at CBSA that make achieving this impossible. There are also varying practices by counsel – in some cases, the Court does not allow early filing (of a deemed refusal) and so counsel must file it last-minute. The Court is trying to achieve something reasonable, but the restrictions on reference to the Application record result in a significant burden on clients, who are quite poor. Counsel is to avoid duplication of excessive parts of the Application record, but counsel then risks being viewed as overly selective and missing relevant context – this is a real tension. Counsel need assurance that they will be supported when following the Guidelines.
Justice Strickland: we are looking at worst-case situations where counsel file multiple motions with a nominal record that refers to a voluminous Application record. We recognize the concern regarding a 'cherry-picking' accusation – these are judgment calls, but we need to move away from filing 600-page motion records.
Justice Diner: the Court generally is not critical of counsel for being overly selective;. In short, there is difficulty managing the current volume of materials being filed, amongst the receiving judge, the Registry, and counsel on the other side.
Justice Strickland: if the other side accuses the Applicant of cherry picking, then they have the onus to provide the missing context that supports their argument.
Justice Diner summarized the proposed time-frame for next steps.

> **Action:** comments from the Bar on the draft stay guidelines by Monday, October 21 (9 a.m.). The Court will reply by October 28. There will then follow another meeting for final comments, if possible, on Wednesday October 30 at 3 p.m. for 1 hr. The Court will then consider the feedback obtained from the Committee. Planned release of guidelines in early November.

4. Subcommittee for Assistance of Unrepresented Litigants

Pro Bono initiative: Michael Battista thanked the sub-Committee members and reported on their work. He then reviewed the project documents that were circulated with the agenda. At this stage, at least 2 more triage and 2 more roster lawyers are needed – please advise Mr. Battista, and refer to members of your organization.

> **Action:** committee members groups are invited to contact their membership for possible volunteers for the pro bono pilot project.

The plan is to roll out the pilot for the next 6 months (or the first 10 files) and then conduct an initial assessment. The proposal is presented to the Committee for approval.

Deborah Drukarsh: it may be useful to exchange documents electronically, so that clients could insert text into a translation App online.

Daniel Latulippe: congratulations on this project. If someone appears at the Registry on day 13 of the 15 day delay, and the file is only then sent to a screening officer, how will they meet 15-day deadline?

Michael Battista: the Registry staff do assist some applicants to fill out templates for the Notice of Application. It was also decided in the group that we would provide assistance to Applicants to start the application – we could fill out a Notice along with a motion for extension.

Anthony Navaneelan (CARL): this is a great initiative and will fill a void. However, it is secondary to legal aid, i.e., for applicants who have been denied legal aid. Given the current materials, this may not be clear – some applicants may not realize that they should first apply to legal aid, rather than see this as the primary legal assistance program. This should be clarified on the poster / form.

Michael Battista: it is addressed in part, but we can clarify this.

Anthony Navaneelan: it should be clear that the first place you go is legal aid, and only second to go to this program.

Raoul Boulakia: we have an obligation to advise clients of their right to apply to legal aid; it should be clear on the poster / form. Also, "cannot afford a lawyer" is too soft; many clients do not qualify for legal aid but could reach a payment agreement with a lawyer; perhaps use more emphatic language – e.g., "denied legal aid and spoke with a lawyer but denied a payment arrangement."

Michael Battista: good, we will amend the materials.

Jack Martin: note that a lot of this material was developed when there was no legal aid.

Justice Diner: thanks to the sub-committee, and to Justice McDonald who just offered to join.

Limited Scope Appearance

Justice Diner: this is another pilot project to be launched in November; if there are any comments, please send feedback to Andrew Baumberg in the next week, to add to the October 30 agenda. The complete Pilot materials are in the agenda to this meeting.

5. Chief Justice Update

The Court is largely scheduling within 90 days across the country, with occasional delays in Toronto and Calgary.

In terms of statistics

- Filings year to date for Leave applications – up 18% this year over 2018, 40% over 2017.
- Of the cases, 41% are refugee, 59% non-refugee.
- The leave grant rate: 19% overall, 36% of perfected case, 37% for 2018, and 39% for 2017/16.
- The judicial review grant rate: 43% granted YTD – identical to 2018; down from 47% in 2017.
- The stay grant rate is 39%, up from 37% in 2018; 34% in 2017; 36% in 2016.

Strategic plan: after the May 31 Committee meeting, the Court launched a public consultation process, tentatively identifying two overarching priorities: (a) modernization and (b) strengthening the court as a national institution.

On modernization, this would include greater use of e-filing and e-service; electronic files as the default file of record; electronic communications as the default mode of communication with the Court; electronic proceedings; electronic scheduling;, and making more documentation from the Court file accessible online (though this is a matter of concern within this Committee) and possibly online resolution The limited feedback received to date provided broad support for the modernization agenda. The second part of the focus has evolved to how to better serve Canadians across the country. Comments welcome (by mid-November), before court meeting early december

> **Action:** Andrew Baumberg to circulate the latest version of the strategic planning consultation document for comments by mid-November.

Raoul Boulakia: there is wide variation amongst refugee law lawyers, some with very limited resources. Anything being mandatory could be problematic, but more efficient processes would be welcomed. There is no flexibility in the legal aid tariff – we need to talk with the legal aid office, though they may be reluctant to engage in long-term planning on this issue given their limited funding.
Jack Martin noted that he has engaged in discussion with legal aid to discuss the tariff for e-processes.

Online access to Documents
The Chief Justice noted that the Court is looking to move ahead for non-IMM proceedings. There has been considerable feedback from the IMM bar. We have heard the concern, particularly with respect to including refugee, PRRA, and H&C cases which draw on risk-based issues. We need to make more progress on discussions with Bar on this issue.
Erin Roth: the CBA has a joint section working group that is developing a draft. A written proposal is being developed for the November 8 meeting of the CBA liaison committee.

On other issues, the Chief Justice noted that the shift to neutral citations for all decisions with reasons have resulted in increased publication / access to decisions, but may have lead to reduced reliance on short endorsement/recital-type decisions within the Court. There has been an increase in the average length of time from hearing to release of decision. There is an increased effort within the Court to issue more endorsements/recital-type decisions and oral decisions in respect of straightforward matters that don't need the usual type of decision. .

Finally, there are two judicial vacancies in Quebec, one in Ontario, as well as one from budget 2018, and three from budget 2019. The Chief Justice encouraged leading members of the bar to apply.

6. Modernization
Justice Diner: the sub-Committee held its first meeting just this last Friday, October 11, with involvement by DOJ and members of the private bar. There are many issues / obstacles to making progress on the electronic process initiatives, though with some suggestions:

> (a) Jack Martin / Andrew Baumberg to engage in discussions with Legal Aid to encourage them to amend their tariff (which currently seems to encourage paper / discourage e-process);
> (b) proposal for the Court to work with the bar to develop practical training programs re electronic practice, which seems to be a major practice gap;
> (c) Deborah Drukarsh at DOJ will help develop (either with RLO or some of the larger law firms) a proposal for an electronic stay pilot, using Dropbox for service of documents.

Deborah Drukarsh – we have a new CM system this week, but will launch the project soon.
Andrew Baumberg also noted Jack Martin's suggestion from the sub-Committee to expand the pilot nationally, though this would require consultation with the IRB. *Is there interest in the wider bar?*
Erin Roth: electronic files proceed on a case by case approach.
Deborah Drukarsh: the key issue is the IRB registry.

> **Action:** Andrew Baumberg to engage with IRB to assess feasibility of a national pilot.

Justice Diner then raised his proposal for a pilot project for electronic stay motions.
Raoul Boulakia: could there not simply be optional e-filing?
Chief Justice: in Australia, the e-filing system is not mandatory, but has 99.9% uptake. One incentive is that there is no screening at the Registry for e-filed documents, though they are of course reviewed by the Court, which can address issues that might arise. A key element of the Australian process has been the granting of "trusted user" status. Counsel who have received that status know that if they file documents that don't comply with the rules (e.g., filing longer submissions than permitted, etc), they risk losing their trusted user status. Overall, this approach is viewed as having been quite successful, as there is general compliance with the Rules. In the U.S., many state Courts have adopted mandatory e-filing.
Andrew Baumberg and Deborah Drukarsh made reference to a small-scale pilot being proposed within the sub-Committee for DOJ for stay motions via dropbox; we need enough volume to assess viability. For further development at the sub-Committee.

7. Ghost representative working group

Justice Diner: There have been some delays with the current discussions between the Bar and the Federation of Law Societies. The Committee has met under the leadership of Justices St. Louis and Roussel and senior members of the bar. The working group is asked to report back at the next meeting.

8. Related Applications

Justice Diner: there are many applications filed separately for members of the same family; at present, there is no mechanism to ensure that they will be heard together by the same judge. He then referred to a proposal from the Chief Justice: a possible practice direction advising the bar that they should bring to the court's attention, when they file an application for leave, whether there are any related applications pending or outstanding.
There were no comments / objection from the Bar. Subject to feedback, the proposal could be incorporated into the upcoming amendment to the Practice Guidelines.

> **Action:** Andrew Baumberg to develop a draft amendment to the Practice Guidelines to require that counsel advise the Court, when they file an application for leave, whether there are any related applications pending or outstanding.

9. Common list of authorities

Justice Diner: there is a working group with Lorne Waldman , Christopher Crighton, Veronica Cham, and Ann Margaret Oberst. The initial focus: a common list of cases for use in motions for stay of removal. Often times, there is insufficient time to file a book of authorities. The working group expects to have a draft list within the next two weeks.

10. Practice Directions – General Comments

Justice Diner: there is an internal Court working group that was just struck to conduct a comprehensive review of all the Practice Notices / Directions. There will be further consultation with the Bar
Any initial comments / concerns are welcome.

11. Varia

For next meeting.

12. Next Meetings

The next meeting is October 30 at 3 pm EST.
For 2020, the CBA conference in Montreal is April 3rd and 4th so the next Liaison Committee will be Friday, April 3, 2020. There will likely also be a Court panel at the CBA conference.